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Department of Water Resources

John K. Simpson
BARKER ROSHOLT & SIMPSON LLP
205 N. 10th Street, Suite 520
P.O. Box 2139
Boise, Idaho 83701-2139
Telephone: (208) 336-0700
Fax: (208) 344-6034
ISB # 4242

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE)
APPLICATION OF NORTH SNAKE)
DISTRICT AND MAGIC VALLEY)
GROUND WATER DISTRICT)
FOR APPROVAL OF A PRELIMINARY)
MITIGATION PLAN)
_____)

NOTICE OF PROTEST

COMES NOW Clear Springs Foods, Inc, by and through its attorney of record Barker Rosholt & Simpson, and hereby formally protests the above application for the approval of the North Snake Ground Water District and Magic Valley Ground Water District Mitigation Plan ("Preliminary Mitigation Plan") filed with Idaho Department of Water Resources "IDWR" on October 9, 2003. Clear Springs Foods, Inc. owns certain water rights throughout the Thousand Springs reach within Water District #130, which are subject to administration and protection from out-of-priority diversions from hydraulically connected sources.

INTRODUCTION

The primary goals of the Preliminary Mitigation Plan can be summarized as follows:

1. To mitigate material injury to senior water rights, if any, resulting from depletions to the Thousand Springs Reach determined to be directly related to the ground water withdrawals from the junior priority rights of the district members. In order to achieve this goal the Districts will acquire and deliver an average of 40,000 acre-feet of replacement water annually. Further, the Districts will attempt to improve water distribution and reduce groundwater withdrawals in key areas utilizing the 40,000 acre-feet of replacement water. Additionally, recharge projects will be developed and where available operational spills from the North Side Canal Company will be utilized;
2. To provide protection of the District's members from a delivery call or other administrative actions seeking to curtail groundwater withdrawals.¹

The Eastern Snake Plain Aquifer ("ESPA") is the lifeblood for irrigated agriculture, aquaculture, recreation, tourism, power generation and other uses of the water that either exists in the aquifer or discharges from the aquifer through springs in the Blackfoot to King Hill Reach. Beneficial use of the spring water discharging from the Thousand Springs Reach began in the late 1800's with irrigation and other water uses in the Hagerman Valley. Local residents began to appreciate the value of the spring discharges beyond simply seasonal irrigation and made beneficial use of these discharges on a year-round basis. Beginning in the 1940's and continuing through the present these year round uses began to include aquaculture facilities, utilizing spring water with ideal temperature and quality for the purposes of commercially growing trout, steelhead and other aquatic species. Moreover, state and federal agencies developed hatcheries in order to facilitate resident and anadromous populations of salmonids.

The small agricultural economy that began in the Hagerman Valley as the sole source of income soon spread into the aquaculture industry. The aquaculture industry now

¹ Preliminary Mitigation Plan pages 20-21.

utilizes springs throughout the Thousand Springs Reach as their primary source of water. This industry has grown to a \$100 million-dollar industry within the State of Idaho. Many of these aquaculture facilities have connections not only within the State, but worldwide. The aquaculture industry employs over 1000 in the local communities in and around the Thousand Springs Reach. These communities rely upon the existence of the aquaculture industry for their local economies and tax base.

Additionally, the Thousand Springs Reach springs provide a source of tourism for the local economies. Throughout the twentieth century travelers have frequented the numerous parks and viewpoints throughout the Thousand Springs Reach in order to view the aesthetically incredible spring discharges. Recreation has grown out of the existence of these spring discharges for fishing, hiking, swimming and other recreational activities. Again, without these springs much of the tourism would not be present in these local communities.

While the local economies themselves do not have water rights protecting the spring discharges and the many benefits that arise out of the existence of the springs, the agricultural, aquaculture, and power generation facilities do have water rights, thereby requiring protection of the spring flows. The individuals or entities holding these water rights have developed land, industrial and commercial facilities in reliance upon the existence of the springs and spring flows. The Idaho Constitution and Idaho Statutes provide protection to all individuals who have obtained water rights.

For those individuals, private entities, and governmental entities, who did not obtain water rights, they in turn expect the State of Idaho, who owns the molecules of water subject

to diversion and beneficial use, and state agencies to protect those ongoing uses and benefits that have been derived from this natural resource that is present for the benefit of all.

Standards for Approval of a Mitigation Plan.

The present plan was submitted in response to the pending expiration of the Interim Stipulated Agreement, which resulted from IDWR's issuance of the Ground Water Management Area Orders in August of 2001. This Interim Stipulated Agreement expires at the end of 2003 and there are currently pending three delivery calls made on the Thousand Springs Reach by spring water users. First, a number of aquaculture facilities and the Earl Hardy Estate filed a request for the delivery of water to fulfill a number of rights throughout the Thousand Springs Reach. These demands for water were made on May 14, 2003 by Clear Lakes Trout Company, Fisheries Development Company, Rim View Trout Company and White Springs. The demand for administration of water was as a result of the aquaculture facilities seeing a reduction of 20-40 percent of the available water in spring flows to satisfy certain water rights.

Additionally, a second demand for the administration of water was made by Rangen Industries in the fall of 2003. The request for administration of water rights is within Water District 130 jurisdiction and must comply with Idaho Code §42-607. That aquaculture facility has experienced declines in spring flows of approximately 65-85%. Also, a third call for delivery of water was made by another aquaculture facility, Aquarius Aquaculture.

The reductions in supplies being experienced by the entities making these calls is symptomatic of the reduction in spring flows throughout the Thousand Springs Reach. Further, these reductions are similar to the reductions experienced by certain ground water rights on the eastern edge of the water district.

The Department's duties oblige it to consider whether the proposed mitigation plan will provide relief to those parties who have made delivery calls, where administrative action or the lack thereof has not resulted in the delivery of water.

Consideration of a proposed mitigation plan in order to avoid curtailment of ground water rights in order to fulfill surface water rights is one of first impression before IDWR. IDWR has considered mitigation plans and other administrative actions in dealing with water right transfers and new applications. The standard for approval of mitigation plans in other administrative actions is one of "no injury to other existing water rights".

In assessing whether or not a mitigation plan should be approved, the Director of IDWR should determine whether or not the proposed plan will deliver water in accordance with the priority doctrine and Idaho Law to water right holders whose priority grants them the right to expect delivery of their water. I.C. § 42-607 provides:

It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . .

The concept of a mitigation plan to allow for the out-of-priority diversion has its roots in the Water District development, the administrative rules governing conjunctive administration and department approval of transfers and new applications.

On February 19, 2002, the Director of IDWR issued an order approving the creation of Water District 130. In approving the Water District the Director identified the duties of the watermaster of Water District 130:

1. Curtail illegal diversions (i.e., any diversion without a water right or an excess of the elements or conditions of the water right);
2. Measure and report the diversions under water rights;
3. Enforce the provisions of the agreements;
4. Curtail out of priority diversions determined by the Director to be causing injury to senior water rights that are not covered by an agreement or a mitigation plan approved by the Director.

With the creation of the Water District empowering the Director in furtherance of Title 42 Chapter 6 to deliver water in accordance with the priority doctrine, water right holders expect and should expect the delivery of their water in accordance with decreed water rights.

If the water is available and the Director does not fulfill the duties identified in the creation of the water district and in accordance with Idaho Code, the Director has failed to carry out his administrative duties. Additionally, if the Director approves a mitigation plan, which does not provide water to fulfill water rights within the district and allows out of priority diversions to continue, the Director has violated his own order.

The priority doctrine and the statute, which defines the Director and the Watermaster's duties, expect such action from the State agency. Moreover, as the SRBA Court declared in Basin-wide Issue #5 on summary judgment order:

Implicit in the efficient administration of water rights is the recognition that a senior should not be required to resort to making a delivery call against competing junior rights in times of shortage in order to have the senior right satisfied. The Idaho Supreme Court made this pointedly clear in the *Musser* case. Instead, IDWR should look to the respective decrees on a common source and if necessary, curtail junior rights or make other delivery adjustments to satisfy rights in a manner that is not inconsistent with the prior appropriation doctrine. Mechanisms such as the delivery call are nonetheless in place should a water right holder dispute the administrative action or lack thereof.

Further, consistent with the policies set forth in IDWR's transfer memorandum a mitigation plan must provide in kind replacement in time and in place in order to be approved. A mitigation plan which does not or cannot be shown to provide water when it can be beneficially used when needed should not be approved. Nor is a plan approvable if it does not provide the amount of water reasonably expected under an application of the priority doctrine. Moreover, a mitigation plan which expects that the prior right expend unreasonable efforts to appropriate its water should not be approved. The issue of declining aquifer levels and spring discharges did not arise simply over the last few years. It took years to put the aquifer and the springs in the declining state now experienced and it will likewise take years to replenish this resource through proper management.

Additionally, any mitigation plan, which is based upon speculation or conjecture should not be approved. A proposed plan, which anticipates certain actions will be taken or water will be available without a reasonable degree of certainty should not be approved. If certain actions may or may not happen, the proposed plan does not have sufficient certainty under which the prior right can depend upon the delivery of water.

Further, a mitigation plan must be analyzed in terms of the geographical scope of the plan and what a plan should compensate for in terms of deprivation to existing water rights, quantify the existing rights that need mitigation, and for losses to the hydrologic system. With new applications for water rights, mitigation plans have recently required compensation to the entire hydrologic system, including the Snake River.² An adequate

² Application for Permit No. 63-31207 in the name of IW Lands, Response to Request for Submittal of IDWR's Staff Memorandum dated August 30, 2001, page 3.

mitigation plan for the Water District should compensate for all losses within that system, not strictly losses to the Reach in the Thousand Springs Area. Therefore, mitigated losses should include the inadequacies of the aquifer to deliver ground water rights in the eastern portion of the water district, specifically A&B Irrigation District rights.

The proposed mitigation should not only satisfy these requirements, it must satisfy the criteria set forth in Rule 43 of the Rules on Conjunctive Management of Surface and Ground Water Resources, IDAPA § 37.03.011.

ADEQUACY OF PRELIMINARY MITIGATION PLAN

The North Snake and Magic Valley Ground Water Districts Preliminary Mitigation Plan would provide 40,000 acre-feet of replacement water, when available, to be utilized on conversion lands or simply recharged into the aquifer. In order to fully analyze the efficacy of the mitigation plan, IDWR must determine the level of depletions being experienced by the aquifer as evidenced by depletions in the Thousand Springs Reach, reduction in spring flows, and reduction in available water to satisfy ground water rights in the aquifer.

Present estimates regarding the depletions to the aquifer can be determined using available data and modeling.

1. Present data regarding reach gains from Milner to Lower Salmon, from the period 1964 to present, indicate the annual depletion to the reach is approximately 1200 cfs (Exhibit 1). These numbers include irrigation return and tributary flows from the north side and the south side of the Snake River between gauges at Milner and King Hill. Estimates or determinations have been made to separate on a percentage basis those reach gains occurring from the south side of the river from the total reach

gains. Kjelstrom³ estimated that 10 percent of the reach gain can be attributed to south side inflow. This percentage was evaluated and adopted for use in the ground water model study of the Twin Falls tract by Cosgrove⁴

2. The data set was further narrowed utilizing the Buhl and Lower Salmon Falls gauge readings. Based upon these gauge readings the reach gain depletions that this section of the Thousand Springs Reach has been experiencing over the last 40 years is plotted in the following graph. (Exhibit 2). This graph reflects an approximate depletive affect in the Reach of 800 cfs or 578,000 af annually.
3. USGS spring flow discharge data is also available for the Thousand Springs Reach. Based upon the USGS data spring flows in the Reach for the period 1902 through 2002 as prepared by the USGS using the Kjelstrom⁵ procedure. This graph shows a decline of 1400 cfs or 21% of the total discharge for the period 1950-2002. (Exhibit 3) This equates to a decline in annual flow from the Northside reach of over 1,010,000 acre-feet.
4. Specific spring flow data is also reflective of the Reach. Spring flow data for the rights, which initiated the Hardy calls in 2003 reflect a decline in spring flows of 20 to 40%. The source of the Rangen water right, the Curren Tunnel, which is at the head of Billingsley Creek, demonstrates a decline of 30 percent in the last 10 years. (Exhibit 4) Billingsley Creek was reportedly dry in 2003 below the last diversion downstream of Highway 30 for the first time in history. Obviously, there may be

³ Kjelstrom, L.C., 1995, Streamflow Gains and Losses in the Snake River and Ground-Water Budgets for the Snake River Plain, Idaho and Eastern Oregon: U.S. Geological Survey Professional Paper 1408-C, 47 p.

⁴ Cosgrove, Donna M., 1997, Geohydrology and Development of a Steady State Ground –Water Model for the Twin Falls, Idaho Area

water rights, which rely upon spring sources, which have not experienced the type of declines experienced by Rangen. Additional data from springs is also available. Target springs, which are indicative of the Reach include Clear Springs, Alpheus Creek, Box Canyon, and Riley Creek. Clear Springs, which provides water to Clear Springs Foods, Inc. Snake River Farm shows a decline from 105 cfs in 1988 to 88.7 cfs in 2003, or a decline of 16% in less than 15 years. (Exhibit 5) Box Canyon spring has been measured by the USGS since 1950. Annual discharge has declined from 430 cfs in 1950 to 338 in 2002, a decrease of 21.4 %. (Exhibit 6) USGS data for Blue Lakes spring shows a decline from 238 cfs in 1950 to 169 cfs in 2002, a decline of 71 cfs in 52 years or 30%. (Exhibit 7) The spring flows give an indication of not only a trend in declining spring flows, but a measure of any benefits which ultimately a mitigation plan might provide to the aquifer and subsequently to the Reach.

5. Current declines in the ground water levels are indicated by the continual mass measurement effort completed by the USGS and IDWR in 2002. Further, the hydrograph in Exhibit 8 is reflective of the ground water level decline experienced at the A&B wells on the eastern edge of the Water District. Hydrographs of wells in the A & B Irrigation District area near Rupert show declines of as much as 35 feet over the period from 1950 to 2002. This decline trend is similar in nature to the declines experienced in the Thousand Springs Reach. Declines being experienced throughout the aquifer must be addressed in order to fully evaluate the adequacy of any mitigation plan.

⁵ Kjelstrom, L.C., 1992, Methods to Estimate Annual Mean Spring Discharge to the Snake River Between Milner Dam and King Hill, Idaho: U.S. Geological Survey Water-Resources Investigations Report 95-

6. The contribution of groundwater pumping to measured or estimated decreases in aquifer levels and correspondingly, spring discharges in the Reach can be estimated utilizing either the current or updated ground water model.

In addressing the adequacy of mitigation, IDWR must look at the status of the aquifer in determining whether or not a proposed mitigation plan fully addresses the issues that the aquifer is experiencing.

Presently, the aquifer is in a state of “mining”, where the withdrawal of water from the aquifer is greater than the recharge to the aquifer. See I.C. §42-237a. A map of water level changes in the ESRPA from 1980 through 2002 shows declines of as much as 15 feet in access in the western part of the ESRPA. (Exhibit 9) In assessing the level of depletions being experienced by the aquifer as a result of ground water withdrawals an assessment of the IDWR water rights database for Basin 36 (Water District 130) was commenced. Based upon the data received from IDWR’s database it appears approximately 4,000 cfs of the North Snake and Magic Valley Groundwater Districts’ ground water rights are present and decreed within Water District 130. Of those water rights, approximately 50% are junior to 1964. Accounting for the level of withdrawal for each water right based upon historic use and volume is difficult. However, the number of water rights and the decreed amounts are not and cannot be disputed. In order for the aquifer to come back in to equilibrium and stabilize, the depletions caused by these ground water rights must be further assessed, compiled, and mitigated for. Analysis of the impact and timing of depletions in the Thousand Springs reach using the transfer spreadsheet (response functions) was performed. Exhibits 10 and 11 show the location percentage depletions and the time of response of springs for which 50 and 80% of the depletion from pumping would occur.

Further, mitigation within the Water district must provide a plan for stabilizing the ground water levels throughout the District and in particular it must provide assurances for increasing ground water levels for areas in which levels have declined to a point where right holders cannot achieve economic withdrawals. Stabilization of spring discharges must also be achieved. The plan should enumerate how and to what levels spring discharges and groundwater levels should be increased.

Mitigation by its very nature is not meant to incorporate hydrologic changes as a result of precipitation or natural recharge. Therefore the mitigation plan should not consider natural hydrologic conditions.

Further, changes in irrigation patterns or delivery systems, which historically have created artificial recharge into the system cannot be part of the mitigation plan. That is, a mitigation plan must stand on its own to mitigate for the effects of the parties proposing mitigation. Further, assessing the impact of changes in irrigation patterns on lands above the aquifer, such as changes from furrow or gravity systems to sprinkler irrigation systems is difficult. Cropping patterns have changed, gravity systems change over time and the change to sprinkler systems does not always result in a decrease in the amount of water being diverted and utilized. Additionally, the very parties that are proposing the mitigation plans are the parties who historically have participated in surface irrigation and at some point in the past voluntarily chose to transfer surface irrigation and rely solely upon groundwater irrigation.

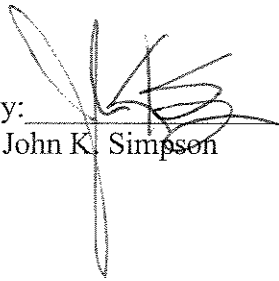
The mitigation plan fails to satisfy the criteria set forth in Rule 43 and described above in so far as:

1. The amount of "replacement water" is not sufficient to mitigate for the depletive effects of the applicants and mitigate for material injury to senior water rights;
2. There is not sufficient certain as to the source of the "replacement water", the availability or the mechanisms for delivery.
3. The plan fails to describe the location and timing of relief associated with the "replacement water."

Therefore, Clear Springs respectfully requests that the Director deny the Application and instruct the Watermaster to carry out the duties described by law and order of the Director.

DATED this 24th day of November, 2003.

BARKER ROSHOLT & SIMPSON

By:  _____
John K. Simpson

CERTIFICATE OF MAILING

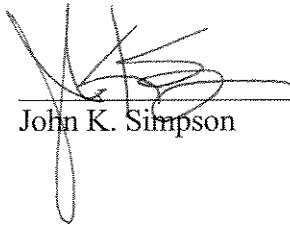
I hereby certify that on this 24th day of November, 2003, I served a copy of the foregoing NOTICE OF PROTEST, by depositing same in the United States mail, postage prepaid, in an envelope, addressed to the following:

Karl Dreher
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

Michael C. Creamer
Givens Pursley
P.O. Box 2720
Boise, Idaho 83701-2720

North Snake Ground Water District
Attn: Mike Faulkner
152 E. Main Street
Jerome, Idaho 83338

Magic Valley Ground Water District
Attn: John Stevenson
Orlo Maughn
453 West 900 North
Rupert, Idaho 83350



John K. Simpson

EXHIBIT 1

Lower Salmon less Milner Total Flow

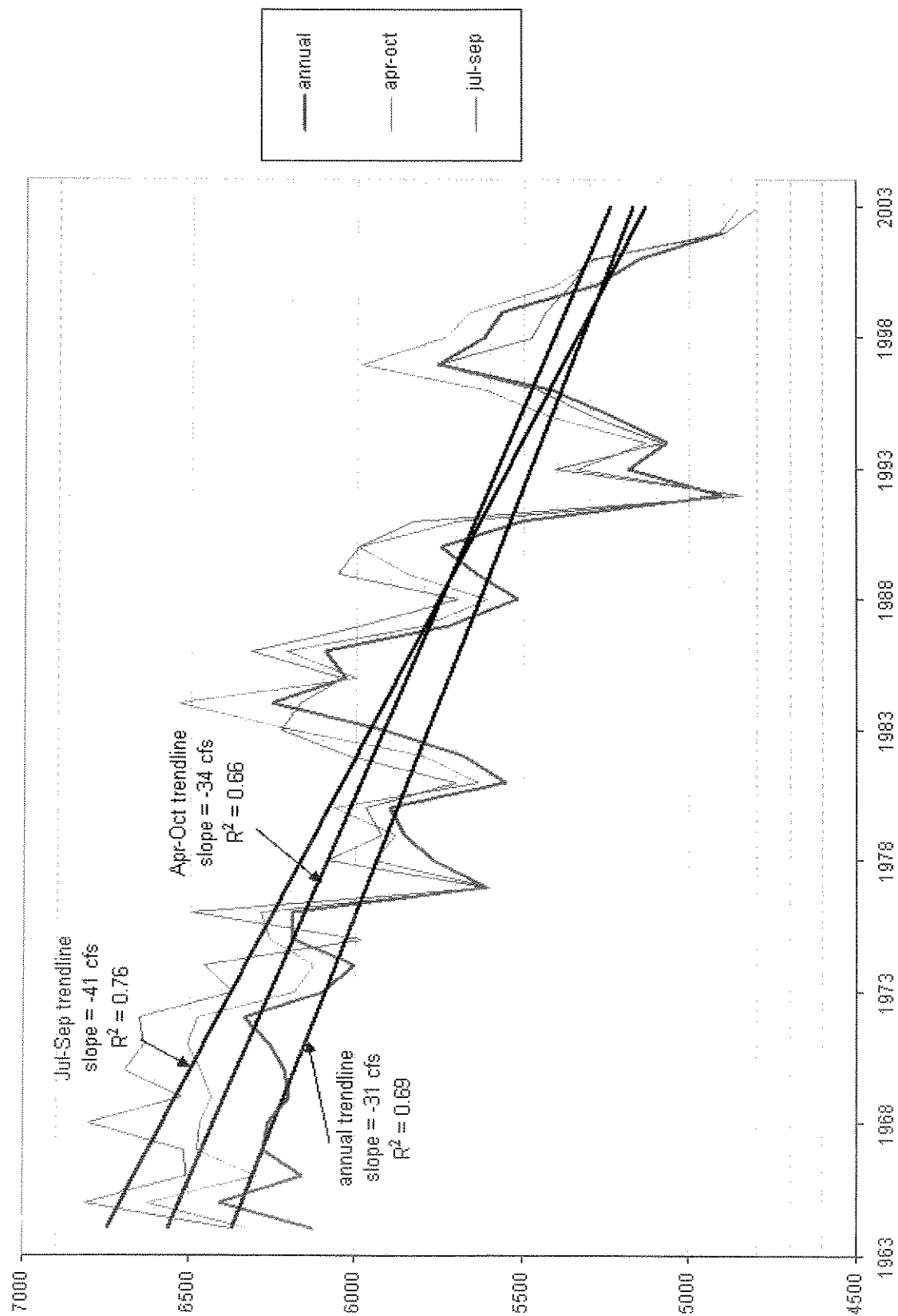


EXHIBIT 2

Lower Salmon less Buhl

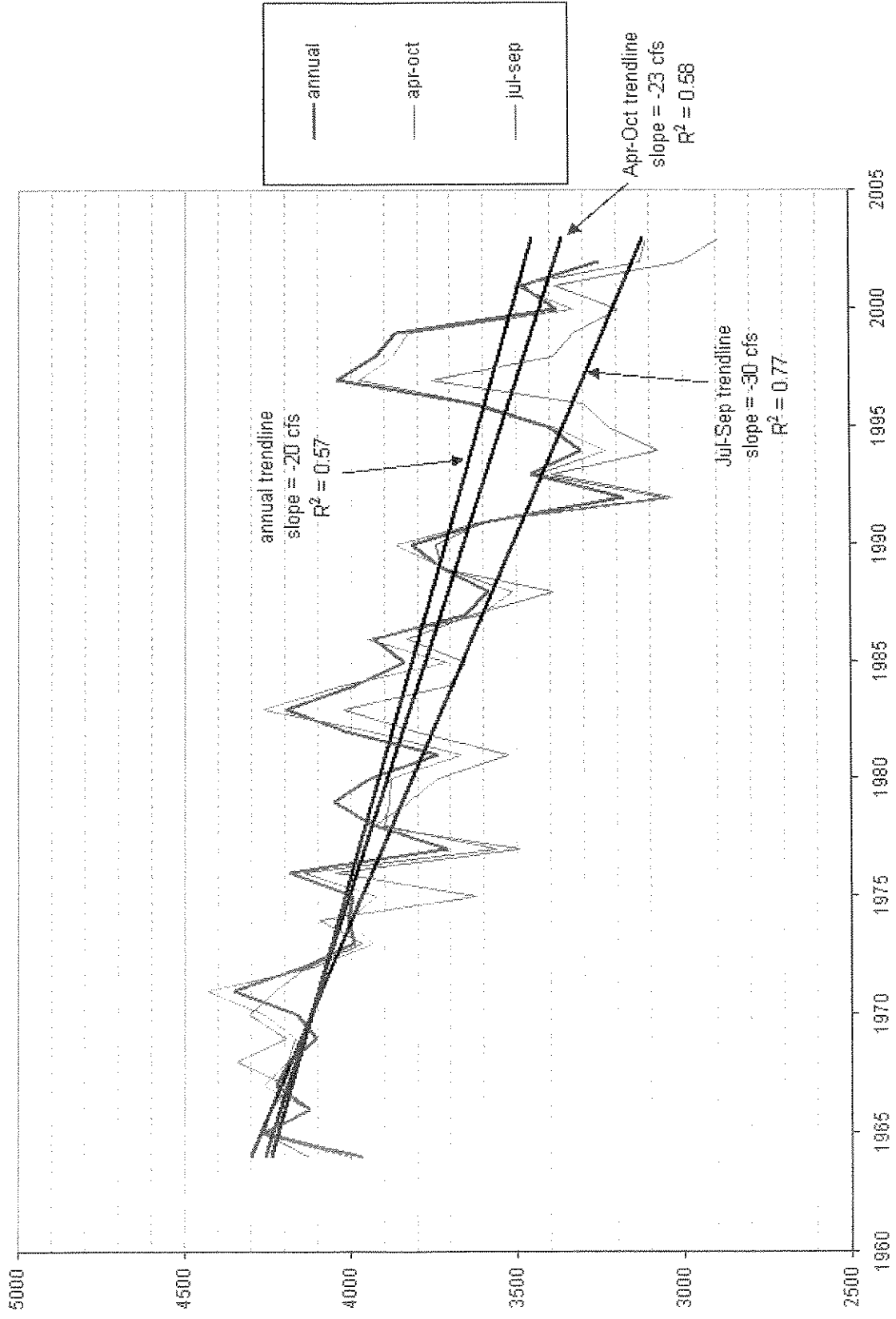


EXHIBIT 3

AVERAGE ANNUAL SPRING DISCHARGE TO SNAKE RIVER BETWEEN MILNER AND KING HILL

1902-2002

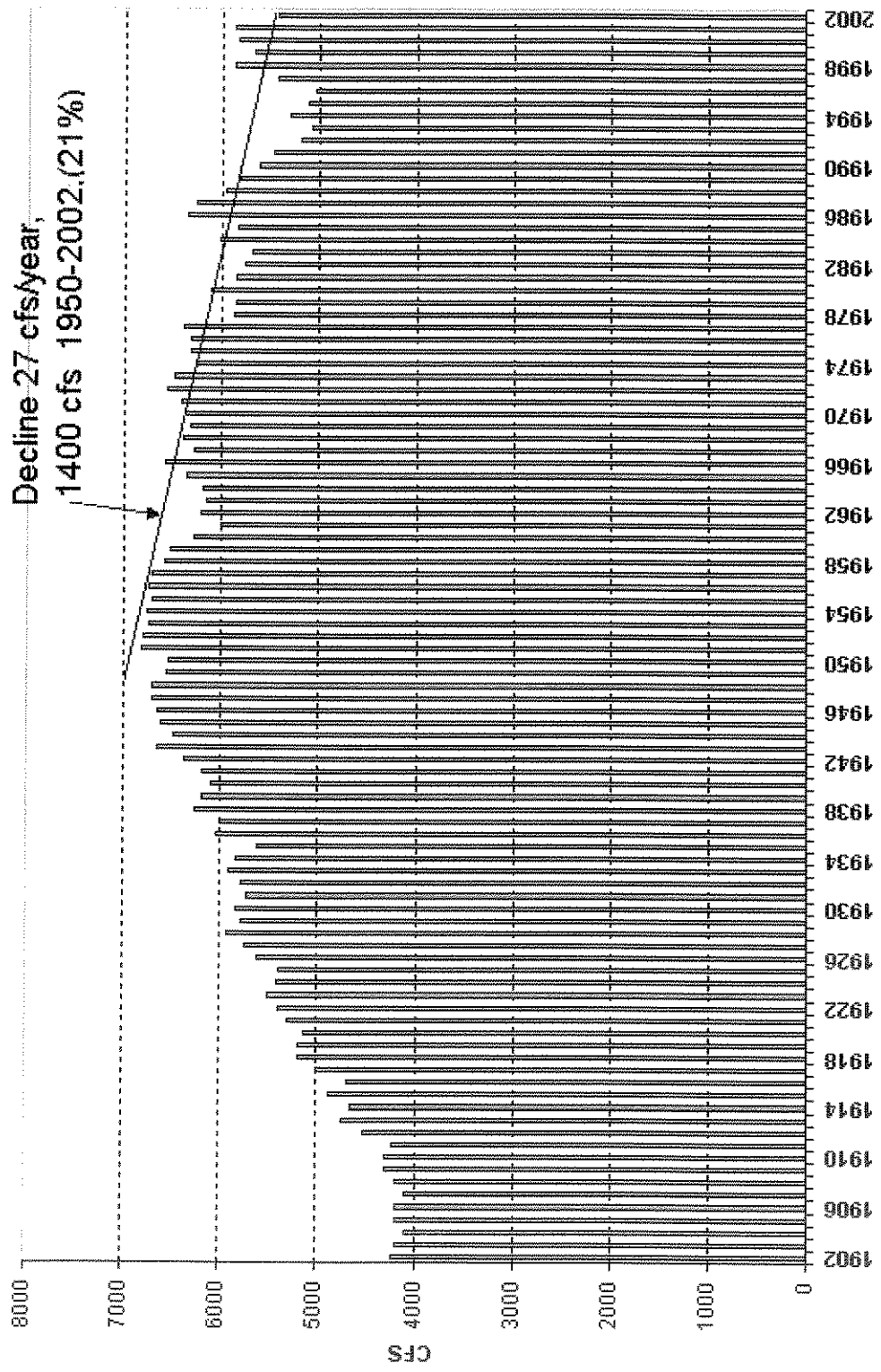


EXHIBIT 4

Current Tunnel Average Daily Flow Rate September 8, 1993 to October 27, 2003

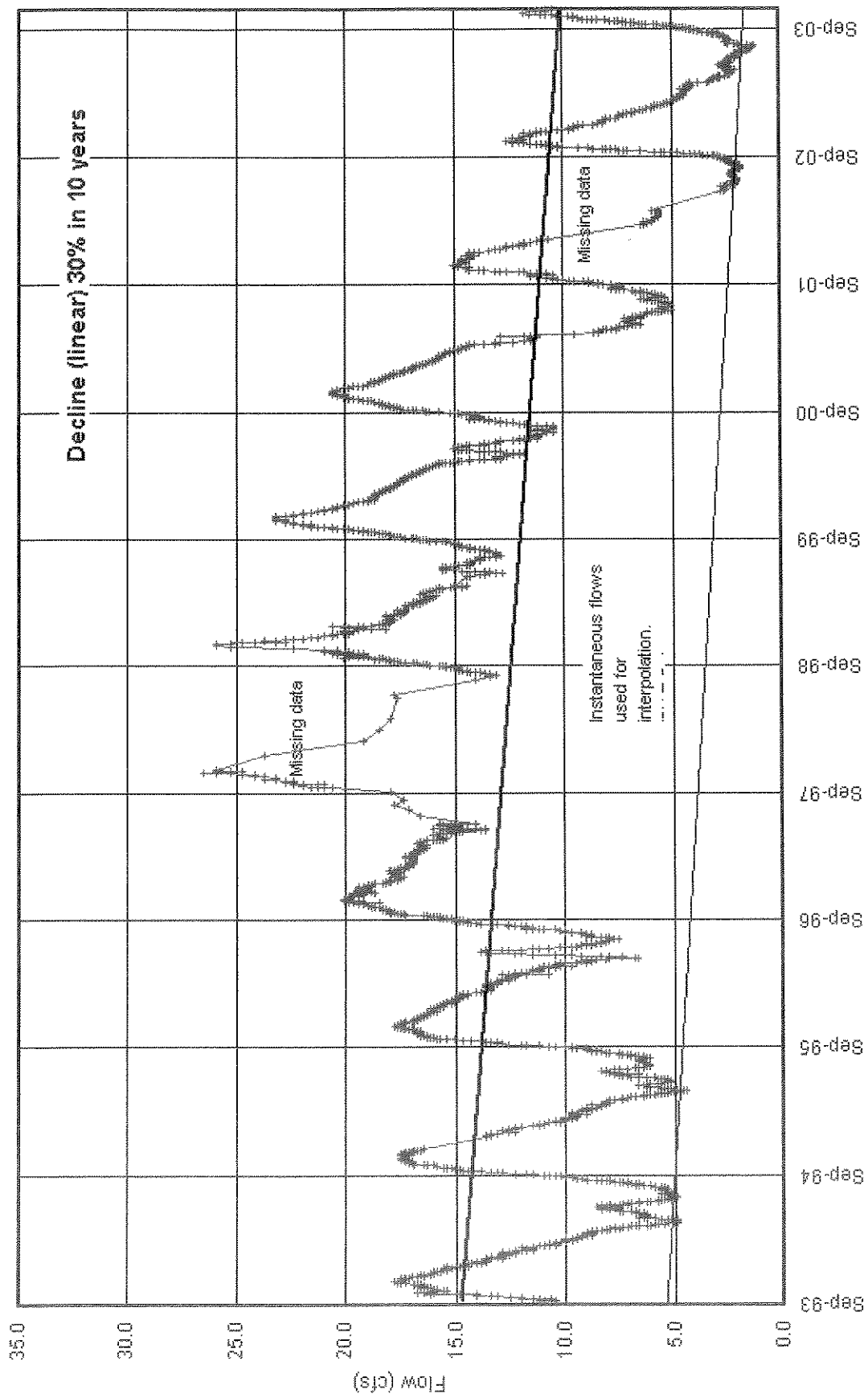


EXHIBIT 5

Clear Springs Foods-Crystal Springs Flow

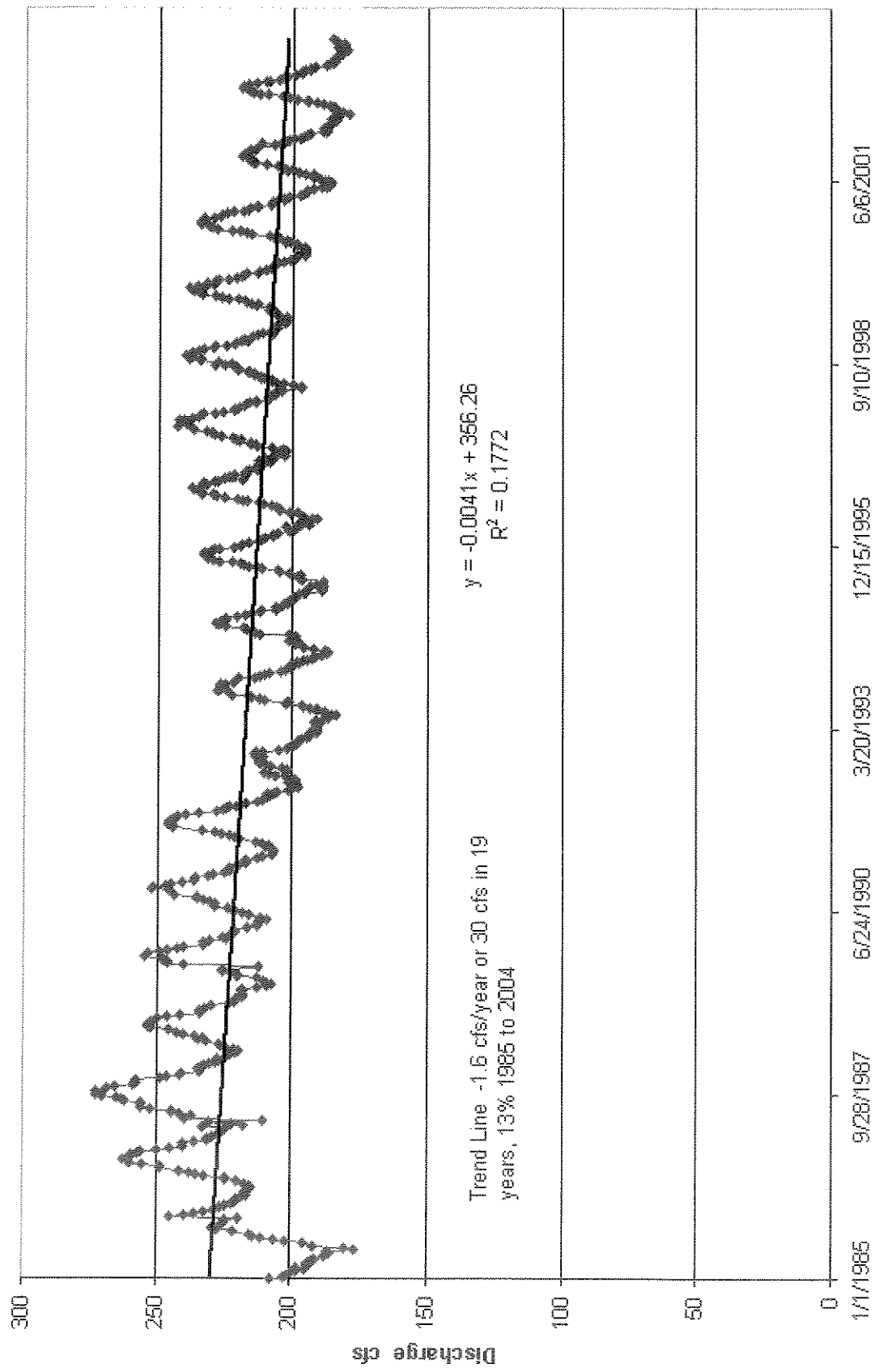


EXHIBIT 6

Box Canyon Spring nr Wendell USGS 1950-2002

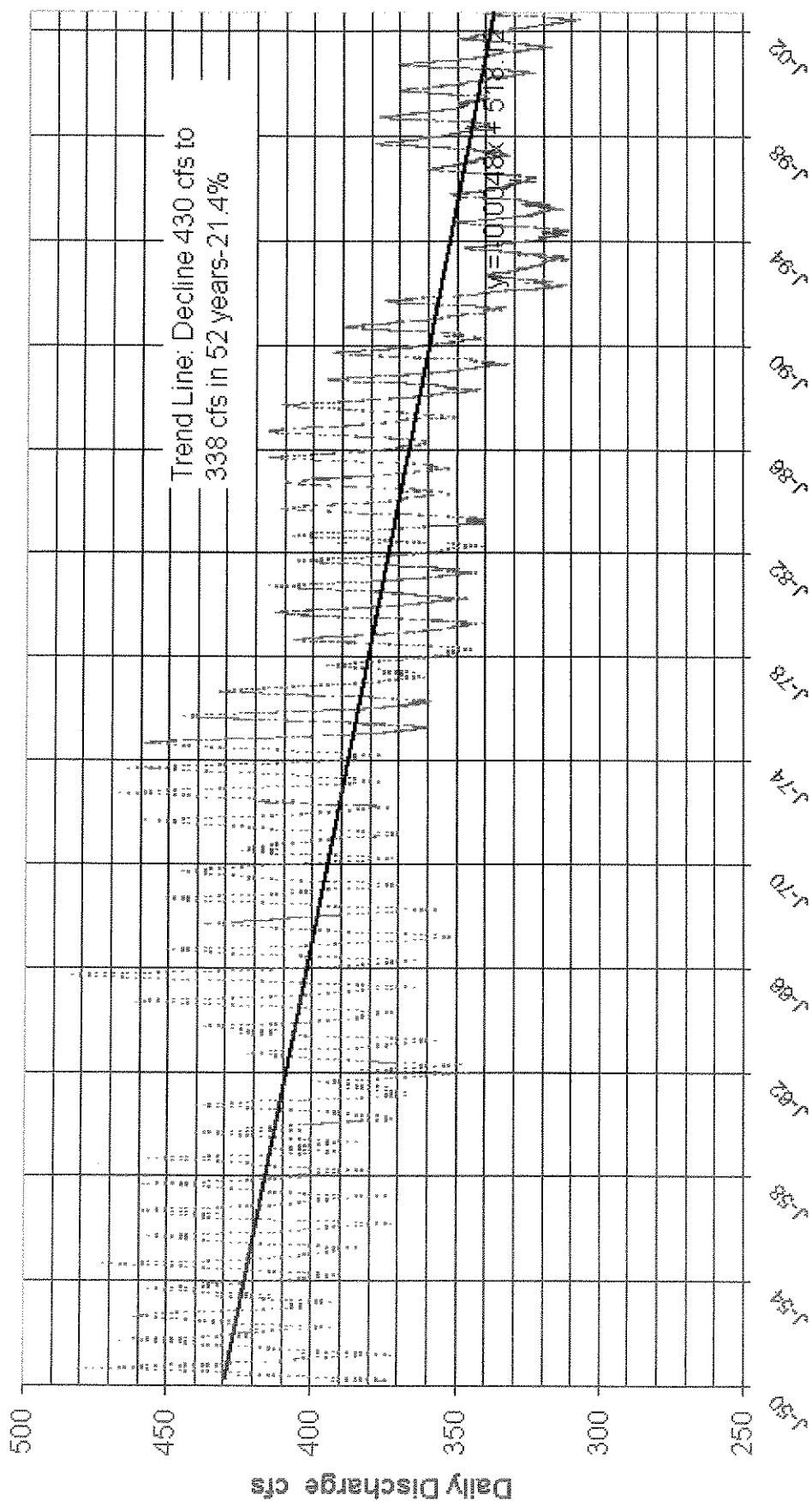


EXHIBIT 7

Blue Lakes Spring - Daily Discharge 1950-2002

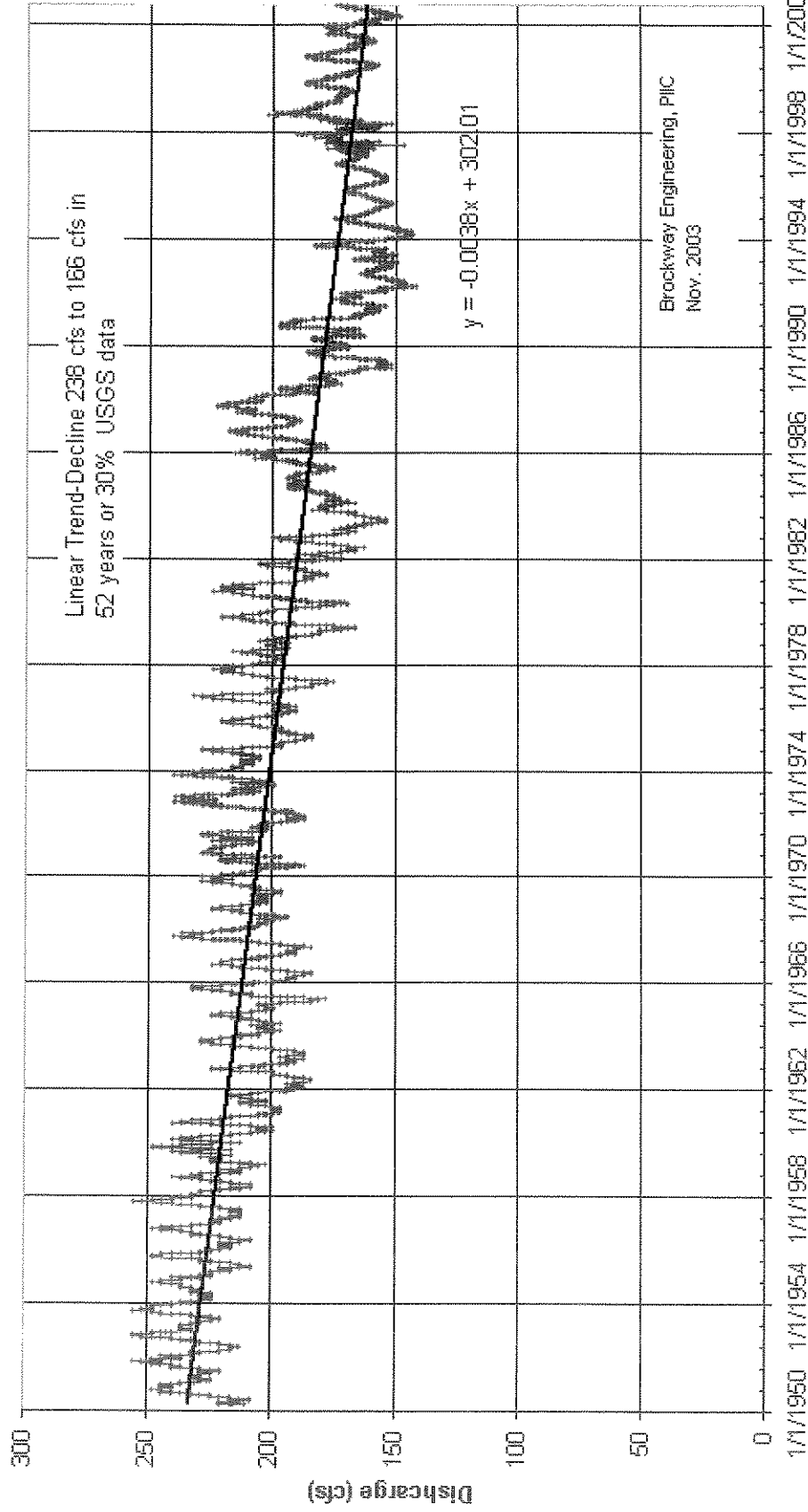


EXHIBIT 8

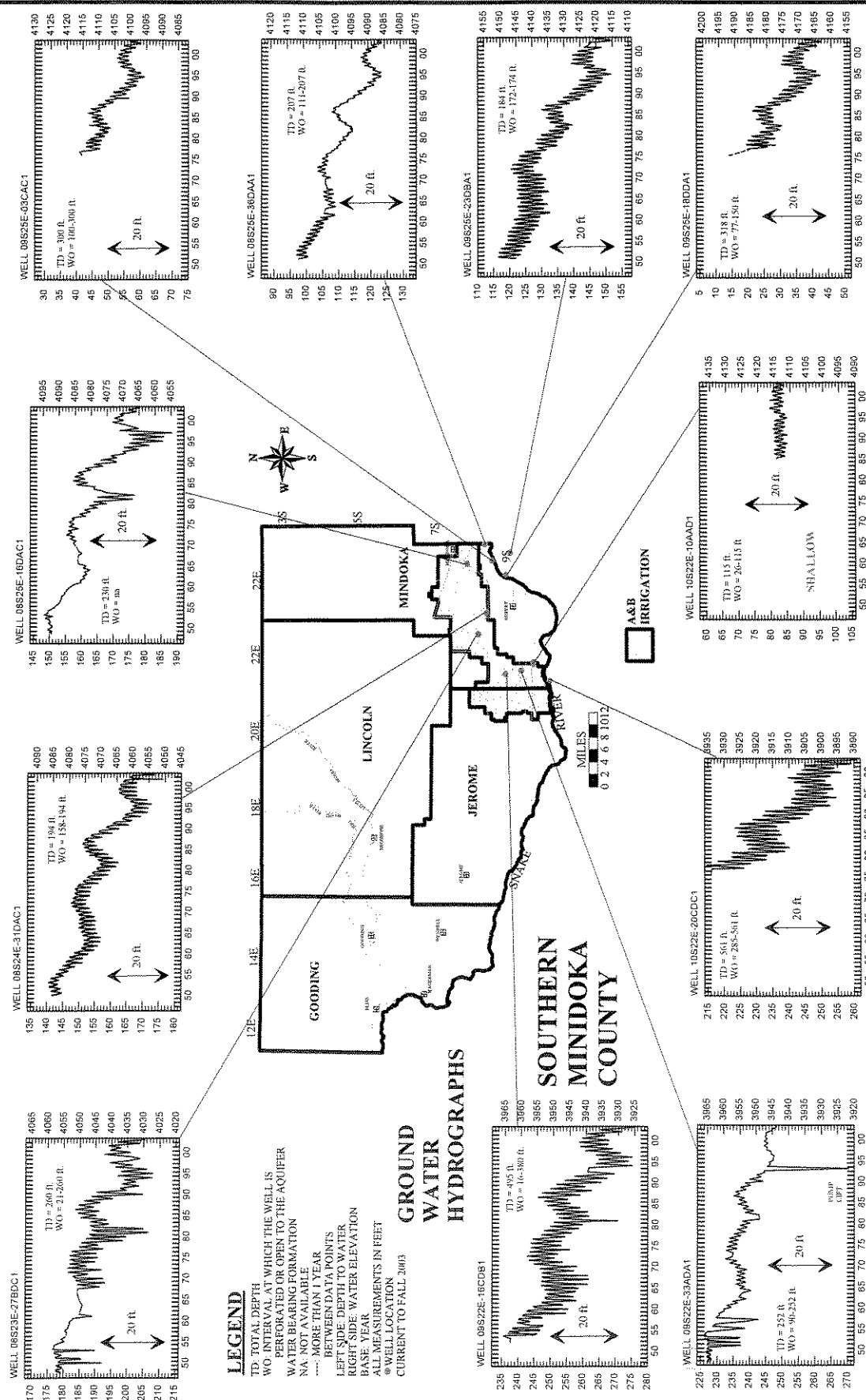


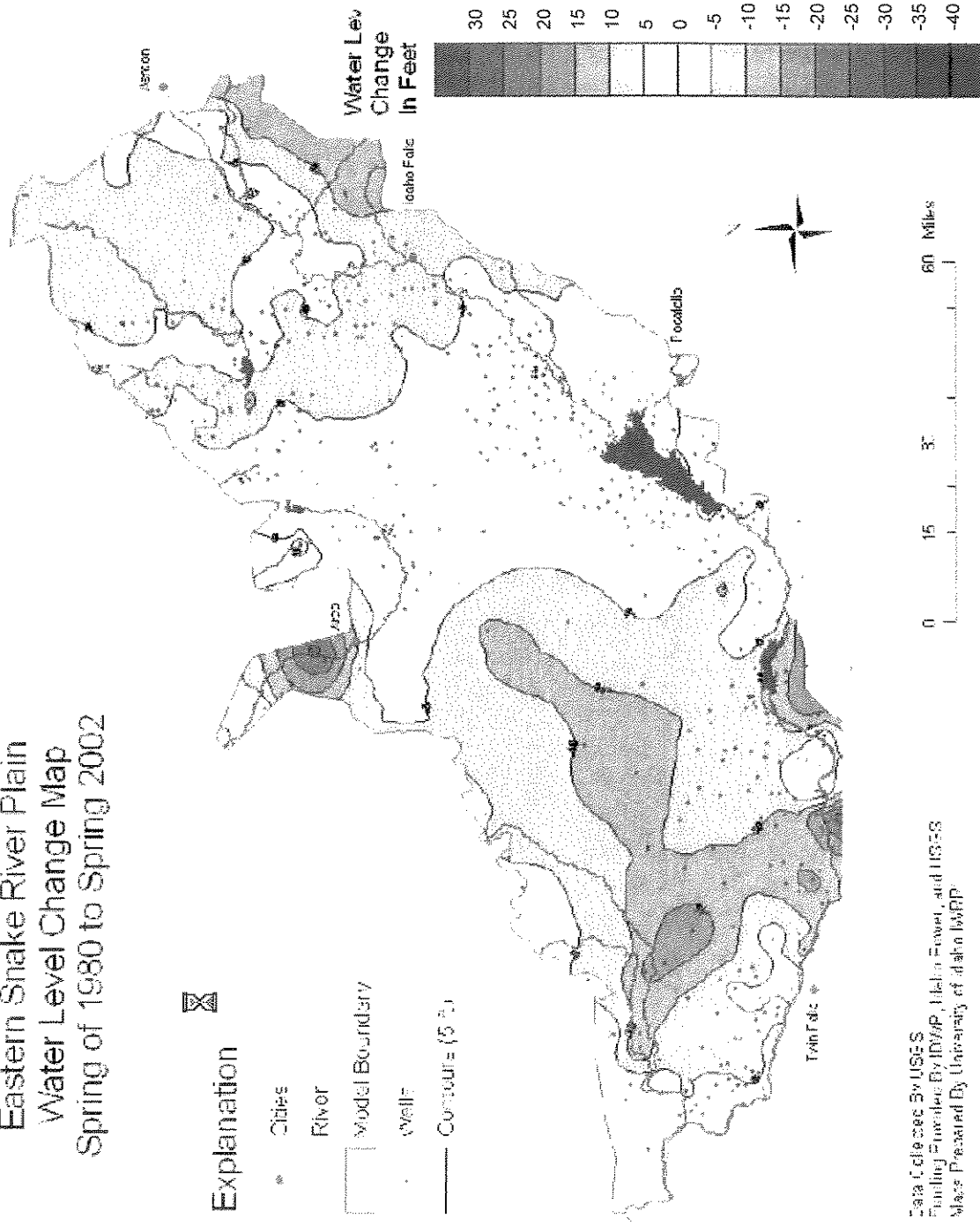
EXHIBIT 9

Eastern Snake River Plain Water Level Change Map Spring of 1980 to Spring 2002



Explanation

- * Cities
- River
- Model Boundary
- Well
- Contour (5 ft)

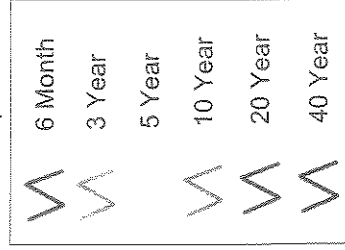


Data Collected by USGS
Funding Provided by IDWR, Idaho Power, and USFS
Maps Prepared By University of Idaho ISRP

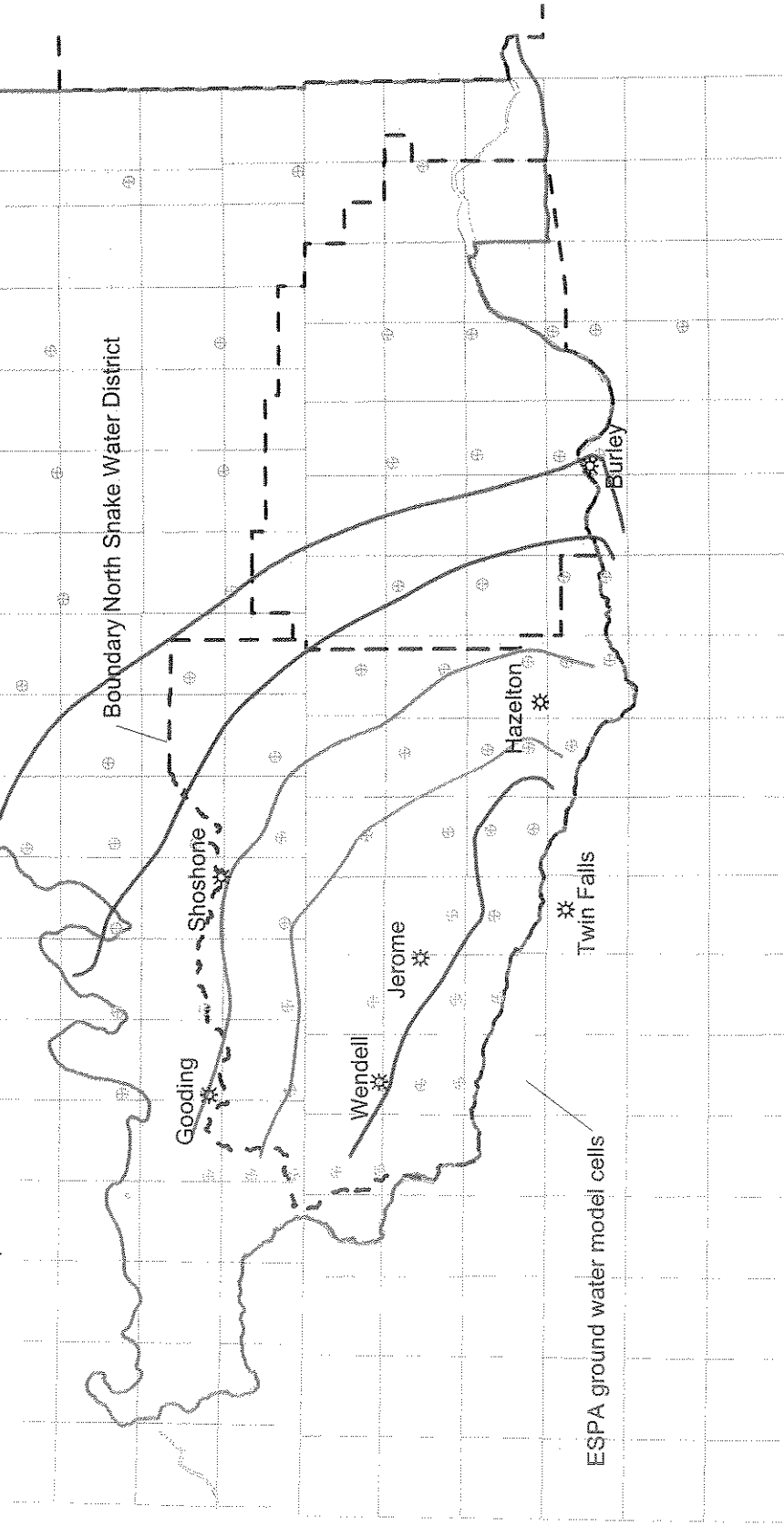
Figure 15 - Spring 1980 to spring 2002 water level change map

EXHIBIT 10

50% Depletion



Sample node for contour development



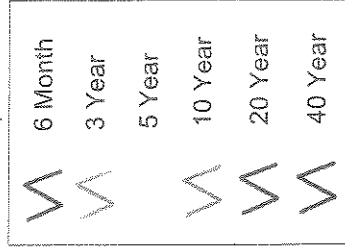
PRELIMINARY

Brockway Engineering
November 17, 2003

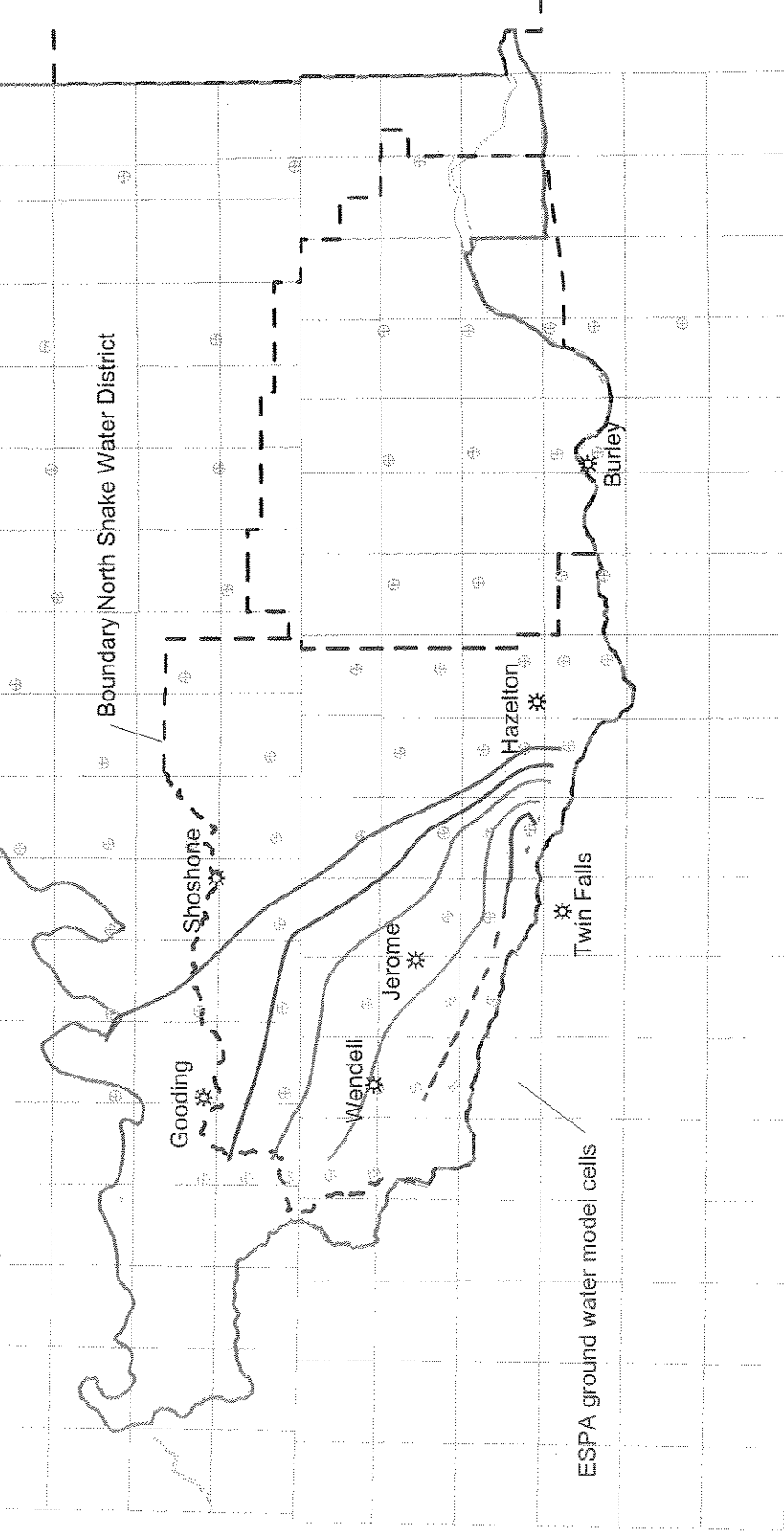
Eastern Snake River Plain Aquifer 50% Depletion Boundary Zones (Milner to King Hill Reach) For Specific Time Periods

EXHIBIT 11

80% Depletion



Sample node for
contour development



PRELIMINARY

Brockway Engineering
November 17, 2003

Eastern Snake River Plain Aquifer 80% Depletion Boundary Zones (Milner to King Hill Reach) For Specific Time Periods